

NO. 21878

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE EUGENE BOSWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR. ,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM P. LAMB,
Assistant U. S. Attorney,

FILED

OCT 20 1967

WM. B. LUCK, CLERK

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

1012007

NO. 21878

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE EUGENE BOSWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR. ,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM P. LAMB,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

I	JURISDICTIONAL STATEMENT	1
II	STATUTES INVOLVED	2
III	STATEMENT OF THE CASE	5
IV	QUESTIONS PRESENTED	7
V	SUMMARY OF ARGUMENT	7
VI	ARGUMENT	8
	A. THE PRESUMPTION THAT OFFICIAL DUTY WAS REGULARLY PERFORMED SHOULD BE APPLIED	8
	B. EVEN IF A FINDING OF REFUSAL TO FURNISH A FORM 150 WAS WARRANTED BY THE EVIDENCE, THE ORDER TO REPORT FOR INDUCTION SHOULD NOT BE VOID	10
VII	CONCLUSION	12
	CERTIFICATE	13

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Boyd v. United States 269 F.2d 607 (9th Cir. 1959)	10
Davis v. United States 374 F.2d 1 (5th Cir. 1967)	8
Elder v. United States 202 F.2d 465 (9th Cir. 1953) cert. denied 345 U.S. 999	10
Keene v. United States 266 F.2d 378 (10th Cir. 1959)	9, 10
Knox v. United States 200 F.2d 398 (9th Cir. 1952)	10
MacMurray v. United States 330 F.2d 928 (9th Cir. 1964)	11
People v. Clements 202 Cal. App. 2d 284 (1962)	9
People v. Cruz 178 Cal. App. 2d 83 (1960)	9
People v. Graham 191 Cal. App. 2d 521 (1961) cert. denied 368 U.S. 864	10
People v. Siemsen 153 Cal. 387 (1908)	10
United States v. DeLime 223 F.2d 96 (3rd Cir. 1955)	11
United States v. Gearey 368 F.2d 144 (2nd Cir. 1966)	11
United States v. Parrott 370 F.2d 388 (9th Cir. 1966) cert. denied (citation not yet reported)	11

Codes

California Evidence Code §607	9
-------------------------------	---

California Evidence Code §664	9
Title 18, United States Code §321	2
Title 28, United States Code §1291	2
Title 28, United States Code §1294	2
Title 50 Appendix, United States Code §456(j)	3
Title 50 Appendix, United States Code §462	1, 2
Title 50 Appendix, United States Code §462(a)	2

Regulations

32 Code of Federal Regulations:	
§1625.2	3, 10
§1641.2(b)	4

NO. 21878

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE EUGENE BOSWELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Bruce Eugene Boswell, was indicted on December 7, 1966 by the Federal Grand Jury for the Southern District of California, Central Division, in Case No. 36873-CD, and charged with violating Title 50 Appendix, United States Code, §462, Universal Military Training and Service Act, by refusing to be inducted [Clerk's Transcript P. 23; hereafter C. T. ____]. Appellant pleaded not guilty and was convicted after a court trial; he was sentenced to the custody of the Attorney General for a period of three years [C. T. 6, 28]. Appellant was represented by retained counsel at all stages of the proceeding.

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, §462, and Title 18, United States Code, §321. This Court has jurisdiction pursuant to Title 28, United States Code, §§1291, 1294.

II

STATUTES INVOLVED

Title 50 Appendix, United States Code, §462(a) provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . , or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . , or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both. . . ."

Title 50 Appendix, United States Code, §456(j) provides in pertinent part as follows:

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. "

Regulations:

Title 32, Code of Federal Regulations, Section 1625.2 provides as follows:

"§1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information

presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. "

Title 32, Code of Federal Regulations, Section 1641.2(b) provides in pertinent part:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege. "

III

STATEMENT OF THE CASE

Appellant registered with Local Board No. 134 [hereafter Board], Santa Ana, California, on July 7, 1961. [Selective Service Transcript of Record, page 2; hereafter T.] On February 17, 1964, the Board received a completed classification questionnaire from appellant [T. 4-11]. Appellant did not assert conscientious objections to war by signing series VIII of this form [T. 7]. On April 2, 1964, appellant was classified as I-A (available for military service), and he was notified of this classification [T. 11]. Thereafter, appellant was found physically acceptable for military service [T. 14].

On August 31, 1964, appellant notified the Board that he was enrolled in Orange Coast College. A student certificate was received by the Board on October 13, 1964 [T. 19-20]. In filling out this form, appellant, in answer to the question whether there were any incidents in his life which might reflect upon his loyalty to the United States, or upon his suitability to perform military duties, stated:

"I will serve my country in a constructive manner which is helpful to it or mankind in general, however, I will not participate in an illegitimate and aggressive war such as that which we are waging and we are escalating in Viet Nam."

Appellant added:

"The United States of America is the agressor and the offender in Viet Nam, and I will have no part of this war." [T. 24].

Upon receiving the above student certificate, appellant was classified as II-S on October 14, 1965, and duly notified of this action [T. 11]. This deferment continued until January 10, 1966, when appellant was classified as I-A, following notice from Orange Coast College that he had withdrawn from his studies [T. 11, 26].

On February 11, 1966, he was ordered to report for induction on February 23, 1966 [T. 27]. The date for induction was postponed by notice sent on February 18, 1966, and the new date to report was set for March 16, 1966 [T. 29]. The day before the scheduled induction, appellant submitted this statement to his Board:

"I would like my position and beliefs made clear from the very beginning of my term in the Armed Services.

"I am willing and would be happy to serve my country in a constructive manner. However, I refuse to fight an illegitimate war or kill or take part in killing foreign people in foreign lands."

Nothing in the file indicates that appellant requested a Form 150 (Special Form for Conscientious Objector), as claimed, or that he was refused such a form upon request. Appellant appeared on March 16, was allocated to the United States Marine Corps, but

refused to submit to induction [T. 30, 31, 44-47, 65, 66].

IV

QUESTIONS PRESENTED

- 1. Can appellee rely on the presumption that official duty was regularly performed?
- 2. On this record, would a refusal to furnish appellant a Form 150 on the day before his induction, void an order to report for induction previously issued?

V

SUMMARY OF ARGUMENT

- 1. The presumption that official duty was regularly performed should be applied.
- 2. Assuming the truth of appellant's testimony that he was refused a Special Form for Conscientious Objector, we submit that the previously issued order to report for induction should not be rendered void, since the record discloses: (a) that the conscientious objector claim, which appellant allegedly was ready to assert on March 15, 1966, had matured prior to the time he was ordered to report for induction, and; (b) the appellant's objection to war was directed only to the war in Viet Nam, and derived from political or philosophical views.

VI

ARGUMENT

- A. THE PRESUMPTION THAT OFFICIAL DUTY WAS REGULARLY PERFORMED SHOULD BE APPLIED.
-

Appellant asserts that he was denied procedural due process by the refusal of a Board employee to give him a Selective Service Form 150, on which he might assert a claim for exemption from military service as a conscientious objector. This refusal allegedly took place on March 15, 1966, the day before appellant was scheduled to report for induction. The Selective Service File does not indicate a request or refusal. There is a document signed by appellant in the file dated March 15, 1966, which does not complain of such a refusal, or attempt to set forth the basis for a conscientious objector claim.

The first notice that the government had of appellant's allegation was at the time of trial, during his direct examination. No effort was made by appellant to subpoena the Board employee, and the government did not have any employees available to testify, since it was without notice of the allegation. No effort was made to file a conscientious objector claim after refusing to report for induction.^{1/}

^{1/} This was done by the registrant in Davis v. United States, 374 F.2d 1 (5th Cir. 1967). In Davis, the Form 150 filed after refusal to report was fully processed, and the claim eventually denied. Only after the claim was acted upon was an indictment brought.

Under these circumstances we contend that the presumption should be applied that official duty was regularly performed. This presumption does not automatically disappear in the face of conflicting evidence. California Evidence Code, § 664. It may be applied in a criminal proceeding to establish the prosecution's case, provided that the defendant does not raise sufficient doubt as to the existence of the presumed fact. California Evidence Code, §607. There is no suggestion in the instant case that the trier of fact applied an improper burden of proof, and it must be assumed that the trial court applied correct standards of proof, and was satisfied that the evidence was sufficient beyond a reasonable doubt to warrant a finding of guilty. People v. Clements, 202 Cal. App. 2d 284, 286 (1962); Cf. People v. Cruz, 178 Cal. App. 2d 83, 88 (1960).

Reliance on the presumption of regularity does not conflict with the presumption of innocence benefitting the accused. Keene v. United States, 266 F. 2d 378, 380 (10th Cir. 1959). There, regarding the "legal presumption which imparts prima facie validity to the proceedings of the draft board," it was stated:

" . . . the presumption which attends these proceedings is founded in the policy of the law, and is derived from the faith and credit we owe to official acts of duly constituted authority. As such, it is legally sufficient to sustain the burden of regularity and validity until dissipated by some probative evidence to the contrary. "

266 F. 2d at p. 380.

See People v. Graham, 191 Cal. App. 2d 521, 532 (1961), cert. denied 368 U.S. 864. We submit that appellant's own testimony at the trial was not sufficiently convincing to overcome the presumption of regularity, and that the trial court's holding, containing an implicit finding to this effect, should not be disturbed. People v. Siemsen, 153 Cal. 387, 390-391 (1908).

In Knox v. United States, 200 F.2d 398 (9th Cir. 1952), relied upon by appellant at page 5 and 6 of his brief, there were indications in the Selective Service File itself that the local board had failed to take necessary action on a conscientious objector claim. Cf. Elder v. United States, 202 F.2d 465, 468 (9th Cir. 1953), cert. denied 345 U.S. 999. In the absence of an indication of irregularity in the file, we submit that the presumption of regularity is applicable, and that it was not rebutted by the testimony of appellant. People v. Siemsen, supra.

B. EVEN IF A FINDING OF REFUSAL TO
FURNISH A FORM 150 WAS WARRANTED
BY THE EVIDENCE, THE ORDER TO
REPORT FOR INDUCTION SHOULD NOT
BE VOID.

Appellant could not have asserted any claim for a new classification, including a conscientious objector classification, after receiving his Order to Report for Induction, unless he could show a change in status resulting from circumstances over which he had no control. 32 C.F.R., §1625.2; Boyd v. United States, 269 F.2d 607 (9th Cir. 1959); Keene v. United States, supra;

Cf. United States v. Parrott, 370 F. 2d 388, 396 (9th Cir. 1966), cert. denied (citation not yet reported); United States v. Gearey, 368 F. 2d 144 (2d Cir. 1966). In Gearey, supra, it was stated that where a conscientious objector claim had matured before notice was sent to report for induction, the registrant's I-A classification could not be reopened. 368 F. 2d at page 149. We submit that the file shows that appellant's beliefs in opposition to war, whatever their nature, were fully expressed before receiving his notice to report for induction [T. 24; compare T. 62]. Appellant admitted this in his testimony, when he agreed that the basis for his belief was the same in October, 1965 (before being ordered to report), as it was in March, 1966 (after being ordered to report) [Reporter's Transcript, pages 11, 12].

If appellant, had he asserted a conscientious objector claim, would not on this record have been entitled to a reopening of his classification and consequent cancellation of his induction order, we submit that the logic of United States v. De Lime, 223 F. 2d 96, 100-101 (3rd Cir. 1955), applies. Even if procedural requirements were not met, the resulting refusal to reopen his classification was mandatory. Cf. MacMurray v. United States, 330 F. 2d 928 (9th Cir. 1964).

Alternatively, the reasoning in De Lime and MacMurray, supra, may be directly applicable to this case, if the court regards this record as establishing on its face that appellant's objections to war were non-religious in nature.

VII

CONCLUSION

For the reasons stated, the decision of the trial court
should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM P. LAMB,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William P. Lamb

WILLIAM P. LAMB

